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OCTOBER TERM, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,
v.
ALLAN BAKKE, *Respondent.*

On Writ of Certiorari to the Supreme Court of California

BRIEF AMICI CURIAE FOR THE FRATERNAL ORDER OF POLICE, THE CONFERENCE OF PENNSYLVANIA STATE POLICE LODGES OF THE FRATERNAL ORDER OF POLICE, THE INTERNATIONAL CONFERENCE OF POLICE ASSOCIATIONS AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

ROGER A. CLARK
JOHN H. C. BARRON, JR.
GEORGE C. SMITH
ROGERS & WELLS
1666 K Street, N.W.
Washington, D.C. 20006
(202) 331-7760
Attorneys for Amici

Of Counsel:
GARY M. LIGHTMAN
Payne Shoemaker Building
Harrisburg, Pennsylvania 17108
JOHN C. RUCKELSHAUS
120 East Market Street
Indianapolis, Indiana 46204
JEROME K. TANKEL
1019 19th Street, N.W.
Washington, D.C. 20036
GLEN R. MURPHY
11 Firstfield Road
Gaithersburg, Maryland 20760

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BRIEF AMICI CURIAE FOR THE FRATERNAL ORDER OF POLICE, THE CONFERENCE OF PENNSYLVANIA STATE POLICE LODGES OF THE FRATERNAL ORDER OF POLICE, THE INTERNATIONAL CONFERENCE OF POLICE ASSOCIATIONS AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

INTEREST OF AMICI

Amicus Fraternal Order of Police ("FOP") is a voluntary association established in 1915 which is composed of approximately 130,000 law enforcement offi-

cers located throughout the United States. Amicus Conference of Pennsylvania State Police Lodges of the Fraternal Order of Police is a voluntary association which is the official collective bargaining representative of the nearly 4,000 members of the Pennsylvania State Police. Amicus International Conference of Police Associations is a non-profit corporation composed of various police associations representing approximately 200,000 law enforcement officers located throughout the United States, Canada and the Canal Zone. Amicus International Association of Chiefs of Police is a voluntary association established in 1893 comprised of approximately 11,000 law enforcement administrators from all parts of the United States and 54 foreign countries. The members of amici are involved in virtually every type of law enforcement activity ranging from service in the Federal Bureau of Investigation, state, county and municipal police forces to providing security on the campuses of many of our nation's academic institutions.

Each of these amici, whose members include persons from many racial and ethnic backgrounds, is fully and firmly committed to the principle of equal opportunity for entry and advancement of all races in all occupations and professions. Amici strongly believe, however, that resort to discriminatory racial quotas or preferences does not serve that principle, but inevitably undermines it.

Police departments across the country have been involved in numerous judicial and administrative proceedings involving the imposition of racial quotas both as to hiring and promotion. One graphic illustration of the invidious discrimination against innocent non-

minorities caused by such racial quotas resulted from the operation of a consent decree entered into by the Commonwealth of Pennsylvania in the context of an employment discrimination case.* By force of the decree, a twenty-year veteran Pennsylvania State Police officer, who ranked 116 out of 2,665 on the promotion eligibility list (based on a competitive written examination and an objectified performance evaluation by his superiors) was recently passed over for promotion so that a minority officer with only five and one-half years of experience who ranked 1,273 on such list could be promoted instead. There was no evidence that the minority officer was in fact a victim of past racial discrimination. Such harsh disparities have an avoidable tendency to undermine morale and breed racial antagonism in a profession where healthy morale and racial harmony are absolutely essential to efficient performance. Further, the subordination of individual merit and service which is inherent in the operation of racial quotas is incompatible with the important goal of assuring that the most qualified personnel available, of whatever race, are selected for police positions.

The Court's decision in the case *sub judice* will have a pivotal effect on the question of whether the racial quota, with all its divisive and arbitrary effects, is to become a fixed feature in our professions and occupations. Accordingly, amici urge the Court to affirm the decision of the Supreme Court of California and, in

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* Bolden, *et. al*, v. Pennsylvania State Police, *et. al*, C.A. No. 73-2604 (Filed Nov. 16, 1973, E.D.Pa.). Amicus Conference of Pennsylvania State Police Lodge of the Fraternal Order of Police and some of its members are currently seeking to intervene in that action to have the consent decree modified.

so doing, reaffirm the basic American value that access and advancement in all fields of endeavour should remain open to all members of society on a fair and equal basis.

CONSENT OF THE PARTIES

This brief amici curiae in support of the respondent is filed with the consent of both parties.

QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment to the Constitution permit a state to systematically deny individuals an equal opportunity to compete for scarce state-controlled benefits critical to their careers for the purpose of awarding such benefits to other individuals on the basis of their race?

SUMMARY OF ARGUMENT

This is a case where the State of California effectively set aside 16% of the seats in its state medical school, through the device of a "Special Admissions Program" for the exclusive enjoyment of applicants of certain minority races. As a result of this racially discriminatory quota, Respondent Allan Bakke was excluded from medical school. Had the victims of the racial quota, for example, been black and the beneficiaries white, a justifiable hue-and-cry of unconstitutional "racism" would have arisen throughout the country, and there can be no doubt that such quotas would have been unreservedly condemned by this Court. Why, we ask, should the result be any different because the victims of racial discrimination are white?

The establishment of any particular level of racial representation in a chosen profession or occupation is not a compelling interest. It is, in fact, wholly incompatible with society's overriding interest in securing the best possible level of service in its professions and occupations through the non-discriminatory allocation of opportunities on the basis of individual merit.

The true compelling interest, the one which a color-blind Constitution mandates, is insuring a truly equal opportunity (and the awareness of such equal opportunity) for all applicants to be considered on their individual merits. That interest cannot be served by resort to a racial quota in the allocation of opportunities for a medical career or any other career.

ARGUMENT

I

THE CALIFORNIA SUPREME COURT PROPERLY HELD THAT A STATE MAY NOT SYSTEMATICALLY DENY INDIVIDUALS AN EQUAL OPPORTUNITY TO COMPETE FOR SCARCE STATE BENEFITS CRITICAL TO THEIR CAREERS IN ORDER THAT OTHER INDIVIDUALS CAN BE AWARDED SUCH BENEFITS BASED ON THEIR RACE

This is a case where the State of California deliberately set aside a substantial portion of the available places in its medical school for the exclusive use of certain selected racial and ethnic categories. As a result of this discriminatory policy, a highly qualified applicant for admission to the medical school was subjected to more rigid and exclusive admissions criteria solely because of the happenstance of his race, resulting in his failure to gain admission. Such discriminatory action by the State is wholly incompatible with the constitutional guarantee of equal protection under

the laws. Only as a necessary last resort to achieving a clearly overriding State objective could the State conceivably justify the erosion of the equal protection principle which is caused by such disparate treatment of individuals based solely on race. In the present case, the State has not remotely demonstrated such a justification.

A. Equal Protection Is Necessary For Individuals Of All Races.

Implicit in petitioners' arguments in this case is the notion that it is somehow unnecessary for white persons to invoke the equal protection of the laws (Petits' Brief pp. 71-73). Reduced to its essentials, petitioners' position is that it is acceptable for the State to discriminate by race against members of the so-called "white majority" so long as the discrimination is the most convenient and manageable means of achieving arbitrary goals of racial representation in the various occupations and professions in our society.

Aside from its basic flaw—that denying whites an equal opportunity to compete for scarce career opportunities is "benign", and therefore acceptable, because it serves laudable ends—this aspect of petitioners' argument is premised on a more particular fallacy: The concept of a cohesive white majority racial group for which the guarantees of the equal protection clause are mere surplusage owing to that group's supposed "control over its own political destiny".[1] (Petits' Brief p. 73)

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[1] Typifying petitioners' approach to this issue is the following generalization (Petits' Brief at 73):

> The majority, or putting it another way, groups that historically have commonly coalesced into political majorities, have a life-or-death control over special-admissions programs. Unlike the insular racial groups accorded suspect-class status in the Court's strict scrutiny cases, respondent's group has control over its own political destiny.

In referring to "respondent's group", one wonders to what petitioners are referring. Whatever that "group" may be, its supposed "life-or-death control over special-admissions programs" has failed to prevent its own purported members from being discriminated against in such programs.

A number of courts, however, have rejected this easy generalization and concluded that membership in the Caucasian race does not immunize one from the frustrating sting of racial discrimination. *E.g., Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975); *Flanagan* v. *President and Directors of Georgetown College,* 417 F. Supp. 377 (D.D.C. 1976); *Anderson* v. *San Francisco Unified School Dist.,* 357 F. Supp. 248 (N.D. Calif. 1972); *Lige* v. *Town of Montclair,* 72 N.J. 5, 367 A.2d 833 (1976).[2] Each of these cases, in addition to the decision here for review, has recognized that discrimination against white individuals through the use of preferential racial quotas allocating scarce benefits or opportunities simply cannot be squared with the principle of equal protection under the laws.

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[2] This Court explicitly recognized the legitimacy and the critical importance of providing relief for reverse or anti-white racial discrimination in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). There, the Court held that 42 U.S.C. § 1981, originally enacted in the Civil Rights Act of 1866, protects whites no less than blacks against racial discrimination. The Court specifically observed that "the bill's concern with equal protection of civil rights for whites as well as nonwhites" was ultimately enacted in, and superseded by, § 1 of the Fourteenth Amendment (which includes the Equal Protection Clause), 427 U.S. 288, n. 19.

Chief Justice Burger aptly identified the fallacy underlying the notion of a cohesive "white majority" in his dissent in *United Jewish Organizations* v. *Carey*, —— U.S. ——, 51 L.Ed.2d 229, 258 (1977):

> The "whites" category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations. It simply cannot be assumed that the . . . interests of all "whites" are even substantially identical.

Further refining the analysis, Justice Brennan observed in his concurring opinion in the same case, —— U.S. at ——, 51 L.Ed.2d at 251:

> [E]specially when interpreting the broad principles embraced by the Equal Protection Clause, we cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification. This impression of injustice may be heightened by the natural consequence of our governing processes that the most "discrete and insular" of whites often will be called upon to bear the immediate, direct costs of benign discrimination.

As the random victims of a discriminatory policy which is couched in terms appealing to the polity as a whole, those in Mr. Bakke's position are particularly vulnerable and insulated in their battle to secure an equal opportunity. They share no common affiliation or social identification which might otherwise attract a coalition of support for their particular grievance. The great majority of whites are unlikely to be affected personally by the specific form of discrimination imposed on Bakke and others similarly situated.

Thus, in contrast to the issue presented in the *Carey* case—where the very "right" in issue was the relative weight of racial voting blocs—the preservation of white voting strength in the populace as a whole provides no shield against that form of discrimination.

However artfully it may be stated, the essential theme of petitioners' position in this case is that those random whites who happen to be seriously injured by such discrimination are not entitled to the equal protection of the laws because they are white. The premise upon which that theory must rise or fall is the false premise that white persons such as Allan Bakke don't really need equal *legal* protection from race discrimination because their membership in some monolithic racial "group" affords them an impregnable *political* protection from harmful discrimination. Of course, no such group—and no such immunity from the harmful effects of race discrimination—actually exists. The very fact that Mr. Bakke and other victims of reverse discrimination have found it necessary to resort to the courts to secure equal treatment in education,[3] employment,[4] and promotion [5] is flatly incompatible with petitioners' premise of a cohesive white majority with "life-or-death control" over state actions which might adversely affect them. Accordingly, this Court should

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[3] *E.g.*, Flanagan v. Georgetown College, *supra*, 417 F. Supp. 377; Henson v. Univ. of Arkansas, 519 F.2d 576 (8th Cir. 1975).

[4] *E.g.*, Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966); WRMA Broadcasting Co. v. Hawthorne, 365 F. Supp. 577 (D.Ala. 1973).

[5] *E.g.*, Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, *supra*; Kirkland v. New York State Dept. of Correctional Serv., 520 F.2d 420 (2d Civ. 1975).

lay to rest the notion that the Equal Protection Clause is the exclusive preserve of certain designated minority races.

B. The Special Admissions Program Severely And Invidiously Discriminates Against White Applicants By Allocating Scarce Career Benefits Pursuant To A Racial Quota.

Quite disingenuously, the University contends that its "special admissions program" for disadvantaged students—which from its inception has been operated to the exclusion of disadvantaged white applicants (CT 168, 201-23 and 388)—did not erect a racial quota (Petits' Brief at 44-45). Rather, contends the University, "the Davis program sets a goal, not a quota" (Petits' Brief at 45).

However, indisputable facts on the record in this case prove that, whether the result be called a "quota" or an enforced minimum, the Davis program was intended to, and did in fact, set aside 16% of the spaces in the medical school for the exclusive benefit of applicants from certain designated minority races or ethnic groups. Although the University had originally contended that the program was intended to benefit all disadvantaged students regardless of race (CT 30, 64-66, 75, 86), it now admits that (Petits' Brief at 5):

> In practice only disadvantaged *members of racial and ethnic minority groups* are admitted under the Tack Force program [emphasis added].

The University next contends, however, that the program really doesn't involve a discriminatory racial quota because all minority students admitted under the program are "qualified" and therefore excluded

non-minority applicants with significantly higher overall admissions ratings[6] have no cause for complaint. If there were not 16 qualified minority applicants in a given year, says the University, it would not meet its "goal" of filling the 16 minority seats. However, while contending on the one hand that this possible shortage of qualified minority applicants is the element of the program that distinguishes it from a preferential quota, the University then concedes in its next breath that *no such possibility really exists,* since

> [G]iven the current demand for medical education, a shortage of qualified minority applicants promises to be a rare event . . . . [T]he problem has become one of turning away qualified minority applicants rather than being unable to meet the admissions goal. [Petits' Brief at 45].

Further, even if one accepts the premise that the program admits only "qualified" minority applicants, this in no way ameliorates the discriminatory burden of imposing distinctly more rigorous admission or "qualification" standards on whites. Surely petitioners would not contend that an admissions program which consciously discriminated in favor of whites would be any the less illegal if all of the whites admitted under such a program were "qualified".

Even a casual comparison of the rejected Mr. Bakke's credentials with those of the average applicant admitted under the special program confirms the

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[6] Ratings which, it should be emphasized, take into account subjective background data in an applicant's file, including the details of a disadvantaged background (CT 63), in addition to such cognitive measures as the undergraduate grade point average (UGPA) and Medical College Admissions Test (MCAT).

harshly discriminatory character of the admissions procedures.[7] Nor can the University explain away the disparities involved by dismissing college grade point averages (OGPA) and Medical College Admission Test (MCAT) scores as invalid tools for measuring the true qualifications of minorities due to some built-in cultural bias.[8] (Petits' Brief p. 31). In the first place, the University's own continued reliance on those standards confirms its belief that they are valid measures of at least some of the abilities which are necessary to success in medical school and in the medical profession itself. But even more importantly, the University's overall "admissions" rating system goes beyond these cognitive measures and gives credit for such subjective factors as disadvantaged background. Even using this subjectively weighted rating system, however, Bakke still received overall ratings of as much as 30 points higher than some of the special program admittees (CT 181, 388).

It is plainly apparent that the Davis special admissions program results in the rejection of more qualified applicants in favor of the less qualified. In so doing it, ". . . violates the fundamental precept in a democratic society that merit, not skin color, should determine an individual's place in society." *Lige* v. *Town of Montclair, supra,* 367 A.2d at 842.

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[7] In 1974, the average special admittee had an overall grade point average of *2.62* compared to Bakke's *3.51,* and overall MCAT score totals of *119* compared to Bakke's *359.*

[8] If either the OGPA or MCAT scores do reflect a built-in cultural bias, the appropriate, *if not required,* action on the part of the University should be to attempt to develop alternative or supplementary testing procedures that neutralize such bias. There is no showing in the record that such an effort was attempted.

The record also shows that any non-minority applicant with an undergraduate OGPA of less than 2.5 (on a 4.0 scale) is *summarily excluded* from any further consideration.[9]

Minority students, however, can be interviewed and *admitted* under the special admissions program even with OGPA's as low at 2.1. Indeed, there is no indication in the record of *any* minimum OGPA which a minority applicant must have achieved to merit an interview or admission.[10]

This aspect of the Davis program entails a more discrete form of reverse discrimination wholly apart from its general discrimination against all whites. That is, the selective application of a 2.5 OGPA threshold in the Davis admissions program particularly discriminates against *disadvantaged* non-minority applicants. As a result, ". . . the most 'discrete and insular' of whites" are "called upon to bear the immediate and direct costs" of so-called "benign" discrimination. *United Jewish Organizations* v. *Carey,* ——

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[9] That is the threshold exclusion criteria applied in the General Admissions program (CT 63, 150-51). Under the Special Admissions program, white applicants (disadvantaged or otherwise) are excluded from consideration *even if they have an OGPA as high as 4.0.*

[10] The absence of identifiable standards for the admission or rejection of minority applicants further rebuts the University's contention that it has not erected a rigid racial quota for the allocation of 16% of its available places in the medical school. The claim that the quota could not be used to admit unqualified minority applicants in preference to qualified non-minority applicants is illusory because, in the absence of any identifiable standards for qualification, there could in practice be no unqualified minority applicants.

U.S. at ——, 51 L.Ed2d at 258 (1977) (Brennan, J., concurring).

The ultimate justification of the Special Admissions program is to "increase opportunities in medical education for disadvantaged citizens" (CT 195-96). Special consideration for the applications of disadvantaged minorities is premised upon the fact that they have suffered economic, educational, and cultural deprivations which make it impossible for them to compete on an equal footing with their more privileged peers in the areas of achievement normally used as a standard for admission to advanced educational facilities.

However, by operating its "Special Admissions" program as the exclusive preserve of a few designated minority races,[11] the University refused to accord disadvantaged non-minority applicants the same sympathetic consideration for economic, cultural and social handicaps which it bestows upon minority applications. Instead, it relegates all white applicants, of whatever economic or cultural background, to its "General Admissions" program. There, the unyielding barrier of the 2.5 OGPA cutoff awaits to deadend the applications of anyone who falls short of that arbitrary standard. Unlike his comparably disadvantaged minority peers, the white applicant rejected by the 2.5 OGPA barrier receives no sympathetic consideration for harsh economic and cultural handicaps which might equally mask the stuff of a promising physician.

[11] As the trial court found (CT 387-88):
In practice this special admissions program is open only to members of minority races and *members of the white race are barred from participation therein*. (emphasis added)

Thus, in making membership in certain minority races the *sine qua non* for access to its special admissions program, the University "introduces a capricious and irrelevant factor working an invidious discrimination." *De Funis* v. *Odegaard,* 416 U.S. 312, 333 (1974) (Douglas, J., dissenting). The focus subtly, but unmistakably, shifts from sympathetic consideration for the individual handicap of a disadvantaged background to arbitrary allocation of benefits by the fiat of a racial quota. Unless the Equal Protection Clause has ceased to guarantee the "personal and present" right to be free from racial discrimination at the hands of the State, *Sweatt* v. *Painter,* 339 U.S. 629, 635 (1950), such preferential practices cannot be allowed to stand under our Constitution.

A further invidious aspect of the University's two-track approach is that it does not discriminate only in favor of those minorities who are actual victims of past discrimination. Thus, the University makes much (Petits' Brief at 21n.12) of the face that Allan Bakke attended Florida schools at a time when *de jure* segregation was in effect. There is no focus, however, on whether or not the students admitted in the Special Admissions program were in fact subjected to a segregated education or otherwise victimized by societal discrimination. While the legacy of discrimination may well have handicapped a substantial number of minority applicants to medical school, it certainly does not follow that all minorities, or even all poor minorities, from all parts of the country are in fact victims of past discrimination.[12] Yet nothing in the record indicates

[12] The fact that "41% of American-born blacks residing in California in 1970 were born in the South" (Petits' Brief at 19) hardly

that a preferred minority under the Special Admissions program must show that his claimed disadvantage is even arguably the result of past discrimination.

As this Court recently made abundantly clear in the context of employment discrimination, competitive benefits may not be conferred on a racial basis except to remedy the adverse effects of actual past discrimination against the individuals being benefited. *International Brotherhood of Teamsters* v. *United States*, —— U.S. ——, 45 U.S.L.W. 4506 (May 31, 1977); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976). Moreover, the benefits must not be preferential in the sense that they award a discriminatee a competitive advantage beyond what he would have enjoyed or earned in the absence of the discriminatory practice. The Court described the difficult task of the trier of fact as follows:

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proves that *all* minority applicants from *all* parts of the country are *ipso facto* victims of past racial discrimination in education. In the context of admission to medical or other professional schools, the relevant category must at least be limited to minorities who have successfully attained a college bachelor's degree. Using petitioners' own figures, all minority applicants to Davis had achieved a level of educational attainment superior to that of 88.7% of the overall *white* population, and 95.5% of the black population (Petits' Brief at 37n.46). Thus, whatever discriminatory obstacles that minority applicants may have faced in their early educational years—and the record is neither specific nor conclusive on this point —it is clear that they were able to avail themselves of more educational benefits than did the great majority of whites in the area of higher education. Further, since most of these applicants attended college during the period 1969-1972, a period when affirmative action in colleges was already in full swing, there is no basis for assuming that their college education was in any way impaired by racial discrimination.

> The task remaining for the District Court on remand will not be a simple one. Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's . . . discriminatory practices. After the victims have been identified, the court must, as nearly as possible, " 'recreate the conditions and relationships that would have been had there been no' " unlawful discrimination. [45 U.S.L.W. at 4518]

In the instant case, the University has neither determined which individuals are in fact victims of prior educational or societal discrimination nor has it attempted to evaluate how *much* preference each individual requires to compensate for the discriminatory disadvantages he actually experienced. This task is admittedly not a "simple one". The University, however, regularly makes comparably difficult assessments in weighing the relative qualifications of applicants in light of their prior cultural or economic disadvantages as among their racial peers, under both the special and general admissions programs. It is only as between the races that this sensitive, even-handed approach is foresworn for the mechanical convenience of a rigid quota. But, as shown below, it is *precisely* in the context of allocating benefits on a racial basis that the strong command of the Equal Protection Clause intervenes to prevent the State from such arbitrary actions.

C. If The Equal Protection Clause Is To Provide Meaningful Protection For Individuals Of All Races, Strict Judicial Scrutiny Must Apply To All State Imposed Classifications Which Deprive An Individual Of A Significant Right Because of His Race.

The University contends that the California Supreme Court erred in subjecting the Davis minority quota program to the equal protection standard of strict judicial scrutiny—i.e., that the challenged quota cannot be sustained unless it is "*necessary* to promote a *compelling* government interest." *Dunn* v. *Blumstein*, 405 U.S. 330, 342 (1972) (emphasis in the original). Petitioners argue that the Davis quota system must be upheld, under the alternative "rational basis" test, so long as it bears "some rational relationship to legitimate state purposes." *San Antonio Indep. School District* v. *Rodriguez*, 411 U.S. 1, 40 (1973).

To begin with, it should be recognized that the University is arguing for a double standard of review under the Equal Protection Clause similar to that it has imposed in its admissions programs. Petitioners would be the first to assert that a program with comparable discriminatory effects upon minorities would, regardless of its underlying motivation, clearly invoke the standard of strict judicial scrutiny. Thus, the University regards the rational basis test as appropriate only where rights of the white majority are adversely affected.

1. *There Is No Basis in Law or in Policy for Affording White Victims of Racial Discrimination a Lesser Degree of Equal Protection; Less Protection Is Obviously Not Equal Protection.*

This Court has repeatedly declared that harmful discriminations based on race are inherently "suspect" and subject to strict scrutiny. As the Court observed in *McLaughlin* v. *Florida*, 379 U.S. 184, 191-193 (1964), in striking down a criminal statute forbidding specified acts between whites and negroes:

> But we deal here with a classification based upon *the race of the participants*, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect." Bolling v. Sharpe, 347 US 497, 499, 98 L ed 884, 886, 74 S Ct 693; and subject to the "most rigid scrutiny," Korematsu v United States, 323 US 214, 216, 89 L ed 194, 198, 65 S Ct 193. . . . [emphasis added]

There is no sound basis why the same standard should not apply where a state university systematically excludes whites from an equal opportunity to compete for scarce educational benefits critical to their careers. As stated by Justice Douglas in his dissent in *De Funis* v. *Odegaard, supra,* 416 U.S. at 333:

> A finding that the state school employed a racial classification in selecting its students subjects it to the strictest scrutiny under the Equal Protection Clause.

The fact that Bakke has no constitutional right to receive a medical school education is irrelevant in

assessing his rights as an individual under the Equal Protection Clause. The relevant right protected under the Equal Protection Clause is Bakke's right as an individual not to be excluded from an equal opportunity to compete for such an important State-controlled benefit because of his race.

Petitioners' attempt to minimize Bakke's injury by analogizing it to that of a family displaced by an urban renewal project or to an urban applicant whose chances for admission are reduced by an admissions policy aimed at increasing the number of doctors likely to practice in remote areas (Petits' Brief p. 56), completely ignores the clear constitutional proscription against exclusions based on race. Similarly, the University's contention that Bakke is entitled to no protection because the State can, within limits, allocate scarce benefits on a racially neutral basis as, for example, by a lottery (Petits' Brief p. 52) equally ignores the constitutional principle that exclusion on the basis of race is impermissible. If the State wishes to use a lottery, that is its business; it may not, however, impose racial criteria as a bar to participation if equal protection of the law is to have any meaning.

Nor is the injury to Bakke, and the violation of his individual rights, any less severe because the University was motivated by a desire to benefit those of another race when to do so was necessarily at his expense. From the standpoint of the excluded individual, it is the University's calculated reduction of his opportunity to gain admission, by placing him in a less-favored racial category, which is the relevant concern. There is nothing benign in the University's intentions toward *his* application.

The California Court placed the issue in proper perspective by focusing upon the question of whether the University's admission standards resulted in a detriment to a *person* solely because of his race. Quoting the language of this Court in *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948), the Court below correctly emphasized that

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the *individual. The rights established are personal rights.* [emphasis added] [13]

The Court properly rejected petitioners' contention that a claim of injury from racial discrimination is entitled to strict judicial scrutiny only if it is asserted by one who can be neatly categorized as a member of a "discrete and insular minority."

Petitioners' argument derives from the contrary—and misguided—premise that the Fourteenth Amendment right to freedom from race discrimination at the hands of the State is a class right which varies in its enforceability depending upon the particular race or ethnic group in which a person is classified. However, the plain language of the Equal Protection

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[13] Similarly, in Sweatt v. Painter, 339 U.S. 629, 635 (1950), this Court again pointed out that the rights guaranteed by the equal protection clause in the context of applying for admission to a state-operated professional school are individual and not class rights:

> It is fundamental that these cases concern rights which are personal and present. [339 U.S. at 635]

See also Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938), where Chief Justice Hughes declared that ". . . petitioner's right was a personal one. It was as an individual that he was entitled to equal protection of the laws."

Clause simply defies such an interpretation. No one need explain to this Court that *less* protection cannot be *equal* protection.

Petitioners' assertion that only members of "discrete and insular minorities" are entitled to invoke the full force of the Equal Protection Clause is also invalid and unworkable for the simple reason that it is impossible to place rational limits on the number of racial and ethnic groups which can validly be characterized as "discrete and insular minorities" in our pluralistic society.

For instance, could this Court assume with confidence that Polish- or Ukranian- or Italian-surnamed Americans do not suffer any debilitating effects resulting from past discrimination? Are Jewish persons immune from invidious discrimination, as indistinguishable from the broader "white majority", or are they more in the nature of a "discrete minority"? Or, if Jews in general do not qualify, what of the more insular Jewish groups, such as the Sephardic?

The futility of answering such questions demonstrates the futility of using the "discrete and insular minority" concept as a litmus test in deciding whether strict judicial scrutiny should be applied in race discrimination cases. More fundamentally, it belies the notion of a monolithic white majority group which is immune from the stings of racial or ethnic discrimination by virtue of its political and social solidarity. (See Point I.A., *supra*) Thus, petitioners misconceive the basis for strict scrutiny by framing the issue—as they do throughout their brief—in terms of generalized dehumanizing categories, rather than in terms of

harm to individual persons. Their argument is the circuitous and conclusory argument that racial classifications adversely affecting the "white group" cannot possibly produce invidious discrimination and therefore strict scrutiny is inapplicable.

But this Court has long since recognized that the right to equal protection of the laws is a *personal* right which cannot be diluted on the grounds that one belongs to a particular racial class. *Shelley* v. *Kraemer, supra.* Race is "a constitutionally 'suspect' means of classifying individuals," *United Jewish Organizations* v. *Carey, supra,* 51 L.Ed.2d at 251 (Brennan, J., concurring). Here, Mr. Bakke's application to medical school was classified by race in order to ensure that members of other races would have a favored position in the selection procedure. That is precisely the kind of discrimination that the Constitution forbids. To give Mr. Bakke's claim any lesser measure of consideration than that given to a member of any other race would make the principle of "equal protection under the laws" a mere hollow and meaningless phrase, effectively splicing it from the Constitution.

2. *None Of The Racially Conscious Remedies Previously Sanctioned By This Court Have Impacts Which Even Approach The Deprivation Of Individual Rights Presented Here.*

The University contends that the impact of its special admissions program on white applicants is essentially no different from the impact upon whites of race-conscious remedies approved by this Court in school desegregation, voting rights, and employment discrimination cases. That proposition simply cannot

withstand analysis. None of the racially-conscious remedies in those cases involved the granting of racial preferences which deprived whites of such a fundamental right as an equal opportunity to compete fairly for scarce but important state benefits.

In the school desegregation cases, no one was denied an equal opportunity to enjoy fully the benefits of public education. Moreover, the adverse impact of the race conscious remedy—such as the inconvenience and unpleasantness of assignment to a school outside the student's neighborhood—fell on persons of all races involved in the reassignment. In contrast, the adverse impact of the Davis quota system is not only consciously confined to certain racial and ethnic categories (i.e., those not designated as "minorities" for purposes of the program), but the racial classification also effectively deprives persons in those categories of equal access to a state medical school.[14]

The voting rights cases are equally distinguishable. In *United Jewish Organizations* v. *Carey, supra,* —— U.S. ——, 51 L.Ed. 2d 229, no white was deprived of the right to vote and whites as a group were assured fair representation in the governing unit as a whole. The adverse effects on whites assigned to voting areas dominated by minorities were speculative at most, since,

[14] United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969), also relied upon heavily by petitioners for the proposition that assignments by racial quota are constitutional even when they entail adverse consequences for a racial category, is inapposite. The Court simply was not confronted in that case with a claim that a qualified white teacher had been deprived of an opportunity to teach in the public schools solely because of the court-imposed faculty assignments ratios, let alone because of a state-imposed racial quota.

if racially polarized voting did occur, whites in those areas would still benefit from decisions by officials in the clear majority in the governing unit who were elected from areas where whites predominated. In the instant case, by contrast, Bakke was completely excluded from access to a state medical education as a result of the University's discriminatory admissions policies.

In the employment discrimination cases, as discussed in Point I.B, *supra,* the race-conscious remedies directed by this Court in *International Brotherhood of Teamsters* v. *United States,* —— U.S. ——, 45 U.S.L.W. 4506 (May 31, 1977) and *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747 (1976) were carefully limited to compensating actual victims of proven past discrimination by placing them as closely as possible in the same competitive position as they would have enjoyed but for the proven discrimination against them. No white is deprived of any competitive benefit which he would have enjoyed without regard to the effects of race discrimination. Certainly, no preference or competitive edge based on race is conferred on the theory that minorities should represent any particular percentage of a workforce. As this Court stated in *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430-431 (1971):

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

Finally, petitioners' reliance upon this Court's approval of preferential employment of Indians within the Bureau of Indian Affairs is completely misplaced. *Morton* v. *Mancari,* 417 U.S. 535 (1974). Resolution of that case turned on the "unique legal status of Indian tribes," whereby governing power was concentrated within the Bureau. The Court specifically found that the preference was not racial, but rather was designed to increase the involvement of the governed in that unique governing process and, therefore, was "reasonably and directly related to a legitimate, *non-racially based goal.*" 417 U.S. at 553 and 554. [Emphasis added] Indeed, the Court expressed reservations as to the legality of employment preferences for Indians if they were less narrowly drawn and therefore could be characterized as racially preferential. *Id.* at 554.

3. *If Reverse Discrimination Quotas Are Allowable, Their Routine Use Will Be Encouraged and Racial Divisions Will Be Exacerbated.*

The concept of a lesser standard of equal protection for some (i.e., those who do not fit into the pigeonhole of a "discrete and insular minority") victims of racial discrimination is internally inconsistent, incompatible with the plain meaning of equal protection, and unworkable as a practical matter in our multi-ethnic and multi-racial society. Beyond those considerations, however, an examination of the consequences of upholding reverse discrimination against whites underscores the error of such an approach.

If this Court were to legitimize so-called "benign" discrimination against whites, it would effectively de-

prive the victims of such discrimination—who may themselves be members of historically disadvantaged ethnic or national-origin minority groups—of any effective means for seeking redress from prejudicial treatment in education and other areas where the government holds increasing control over the flow of benefits to society.

Further, a holding that racial quotas which harm "only" whites can pass constitutional muster will surely encourage the proliferation of such quotas in our institutions. As manifested by the plain facts in this and countless other cases,[15] our institutions have *already* shown a tendency to resort to racial or other class quotas as a convenient method of meeting the demands of various racial or social groups.[16] These amici strenuously submit that if this Court holds that such quotas may be erected resort to racial or class quotas will be institutionalized as a routine response to the demands of any race or class which has the cohesion to make its demands felt. Such race-conscious policies can only lead to counter-pressures from other racial or ethnic groups excluded from the preferential quota, leading to an endless cycle of debate over which groups are to be favored and which are to be left to their own devices. As recently emphasized by Justice Brennan, concurring in *United Jewish Organizations* v. *Carey, supra,* 51 L.Ed.2d at 251:

> [E]ven in the pursuit of remedial objectives, *an explicit policy of assignment by race may serve*

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[15] *See* notes 3-5, *supra.*

[16] *See* Glazer, "Affirmative Discrimination—Ethnic Inequality and Public Policy", pp. 73-76 (1975), for a concise description of this phenomenon.

> *to stimulate our society's latent race consciousness,* suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs. [emphasis added]

If this Court approves quota systems such as that utilized in the Davis program, its decision inevitably will be construed as confirming "the utility and propriety" of allocating benefits and opportunities in our society on the basis of racial or ethnic category. The concept of the racial quota will have gained an ultimate legitimacy not heretofore recognized in our law, and groups who would seek to benefit from such quotas will be encouraged to demand their expansion into new fields. Faced with such demands, all too easily will our institutions be able to find a "benign" reason for yielding to them, and assignment of benefits by race will become a routine bureaucratic response. *Cf. Hughes* v. *Superior Court,* 339 U.S. 460, 463-64 (1950).[17]

Thus, it is critical that this Court reject *all* detrimental classifications based upon race. Any other result holds the promise of legitimizing and institutionalizing color-consciousness as a valid and permanent norm in our society.

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[17] Where, in finding that California could constitutionally enjoin the picketing there involved, this Court quoted from the opinion of the California Supreme Court, which noted that the pickets would

> [M]ake the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. *If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis.* [emphasis added]

II

THE ONLY POSSIBLE COMPELLING STATE INTEREST HERE INVOLVED IS THAT MINORITIES BE ENCOURAGED TO ENTER THE MEDICAL PROFESSION AND HAVE A FAIR AND EQUAL OPPORTUNITY TO DO SO

In holding that the Davis admissions program was unconstitutional, the California Supreme Court "assumed arguendo" that certain objectives of the Davis special admissions program were sufficient to establish a "compelling government interest". Two objectives which the court "assumed" to be "compelling" were (1) the need to increase the numbers of minority students in the medical school and minority doctors in the medical profession; and (2) the need to increase the number of doctors willing to serve minority communities.

These assumptions made by the California Court were permissible for its own analytical purposes, in light of its independent determination that the discriminatory measures adopted at Davis were not shown to be necessary to achieve the stated objectives of the program.

However, given the far-reaching importance of this Court's disposition of the issues involved here, it would be inappropriate to assume any of the critical propositions upon which the decision of this Court is ultimately based. The question of precisely what compelling government interest—if any—could possibly justify resort to reverse racial discrimination is critical to the future course of the law in this area.

These amici respectfully submit that the California Court too readily assumed [18] the validity of the University's characterization of what compelling state interests could be served by quotas which deprive white persons of state-controlled benefits on the basis of race.

As indicated above, amici do not believe that any constitutionally permissible purpose can serve to justify invidious government-imposed distinctions based on race.[19] As Justice Douglas observed in his *De Funis* dissent (416 U.S. at 343-44):

> If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordionlike quality . . . . So far as race is concerned, *any* state-sponsored preference to one race over another . . . is in my view "invidious" and violative of the Equal Protection Clause. [Emphasis added]

However that may be, it is only necessary here to define *accurately* those "compelling" interests which might be legitimately invoked. Once those interests are accurately defined, it becomes plainly apparent that the discriminatory measures taken by the University are simply not necessary to achieve them and are therefore unconstitutional under the settled case law.

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[18] Although it is clear that this erroneous assumption in no way undermined the correctness of the California Court's disposition of the case that was before it.

[19] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., joined by Douglas, J., concurring); Commonwealth of Pa. v. Glickman, 370 F. Supp. 724, 736 (W.D.Pa. 1974).

Dunn v. *Blumstein, supra,* 405 U.S. at 342; *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969); *Kramer* v. *Union Free School Dist.,* 395 U.S. 621, 627 (1969).

It is submitted that the University has misconceived the nature of the only *legitimate* state interest in this connection which could be fairly viewed as compelling: That is, *the need to afford minorities a fair and equal opportunity to enter the medical profession and to create awareness among minorities that such an equal opportunity exists.*

This legitimate and commendable interest of the State is to be distinguished from the dubious proposition that the State should take all necessary measures to *ensure that members of certain minorities in fact constitute* some given proportion of medical school enrollment. Implicit in this proposition is the discredited premise that the composition of the various careers, occupations and professions in our society must somehow reflect the racial and ethnic categories in our society. As Justice Dougles further pointed out in his dissent in *De Funis, supra,* 416 U.S. at 342,

> The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University . . . cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans.

A. Racial Quotas Conflict With Other Overriding State Interests.

The State might have a compelling interest in preferential measures to ensure a more proportional rep-

resentation of blacks and other historically prejudiced minorities in the professions and other desirable occupations if the benefit to the minorities could be viewed in isolation. But the concept of a "compelling interest" is a relative one, which must take into account the detriments as well as the benefits of a particular State action or policy. Here, for instance, erecting a quota to ensure substantial minority representation in the medical school necessarily entails a countervailing reduction in medical school opportunities available to non-minority aspirants. This reduction comes at a time when competition for the available opportunities has become increasingly keen. Aspirants from a multitude of ethnic and religious groups, no less than from those minorities preferred by the Davis program, clamor for the chance to fulfill their professional ambitions.

Aside from cultivating the critical perception of fairness among all groups,[20] use of *racially neutral* criteria is also more likely to serve society's overriding interest in having all of its professions and occupations filled by the most competent and qualified available candidates. As stated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801 (1973):

> There are societal as well as personal interests on both sides of this equation. The broad, *overriding* interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship *assured through fair and racially neutral employment and personnel decisions.* In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise [emphasis added].

[20] *See* Glazer, "Affirmative Discrimination—Ethnic Inequality and Public Policy" p. 195 (1975), where the author pointedly observes: "Nothing is so powerful in the modern world as the perception of unfairness."

See also Morrow v. *Dillard*, 412 F. Supp. 494, 501 (S.D.Miss. 1976).

Whether or not one accepts the University's assertion that only "qualified" applicants are admitted under its special admissions program, it is impossible to avoid the conclusion that the program effectively excludes from the medical school candidates whose qualifications are markedly superior to those of the candidates actually admitted under the program. See Point I.B., *supra*. In this way, the program "reinforce[s] the view that it is the race of the applicants that is important, rather than their qualifications." *Harper* v. *Mayor and City Council of Baltimore*, 359 F.Supp. 1187, 1214 (D.Md.), *modified on other grounds and aff'd*, 486 F.2d 1134 (4th Cir. 1973).[21] When this inevitable consequence of assigning career opportunities by racial quota is taken into account, the state interest in the quotas loses whatever "compelling" character it might otherwise have had.

Yet petitioners would have it that the need to assure some "acceptable" ratio of minority representation

[21] In *Harper*, the court failed to find a sufficiently compelling state interest to justify imposition of a racial quota in the hiring of firemen. As the court held:

> The Court simply concludes that the law's rigid scrutiny of racial classifications must be an element of the Court's exercise of its remedial powers. And in this case, no sufficient compelling need exists for the imposition of quotas. Such quotas would reinforce the view that it is the race of the applicants that is important, rather than their qualifications. 359 F. Supp. at 1214.

in the medical schools and the medical profession is of such critical importance that the rights of persons of other races to equal opportunity in those fields must yield to it. Beyond that, the University views the need as so compelling that the less qualified may supplant the more qualified in order to achieve the goal of "acceptable" levels of minority representation.

But by what logic can petitioners contend that there is not also a compelling need for "acceptable" levels of minority representation among, say, certified neurologists or cardiologists, or in the faculty of the Davis Medical School? If racial diversity in the medical profession is a compelling need, it simply cannot be maintained that racial diversity in the important medical specialties is not also a compelling need. Petitioners pointedly observe that "shortages" of minority representation in those areas is no less a function of past discrimination than is the "shortage" in the medical school student body (Petits' Brief at pp. 21-22).

Thus, if this Court were to ratify the legality of the Davis quota system, what would happen if resultant increases in minority graduates did not rapidly result in "acceptable" representation in the advanced areas posited? By the very logic of petitioners' arguments in this case, it would become incumbent upon the State of California to *ensure* that level of representation through a race-conscious remedy. Further, in light of the State's performance in this case, one could reasonably expect that the remedy would involve the "adjustment" of standards governing certification to take into account any racial or cultural bias inherent in the certification system. Objections that the adjusted standards resulted in the certification of less qualified

specialists would be met with the rejoinders that "nothing in the Constitution compels" the state to certify only the best qualified specialists and that "formal credentials simply are not that reliable as predictors". (Petits' brief at 51).

The hypothetical posited above is not as farfetched as it may seem at first glance. Comparable scenarios have already occurred in actual practice.[22] The inexorable expansion of preferential quotas into virtually every field of human endeavor flows naturally from the premise that there is a compelling interest in achieving an "acceptable" level of racial representation *per se* in any field.

But that premise founders upon recognition of society's broader, overriding interest in obtaining the best possible performance in all occupations and professions, assured through fair and racially neutral selection and advancement criteria. *Cf. McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 801. Further, nothing could be more detrimental to the harmonizing of the competing interests involved than to create a perception that the "dice are loaded" in favor of cer-

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[22] *See* Hook, "The Road to a University 'Quota System'", in *Freedom at Issue,* No. 12, March-April 1972, p. 21, where the author describes an instance of the federal government's activities in the area of university affirmative action programs:

> At one Ivy League university, representatives of the Regional HEW demanded an explanation of why there were no women or minority students in the Graduate Department of Religious Studies. They were told that a reading knowledge of Hebrew and Greek were presupposed. Whereupon the representatives of HEW advised orally: "*Then end those old fashioned programs that require irrelevant languages. And start up programs on relevant things which minority group students can study without learning languages.*"

tain groups or classes, be they racial or otherwise. As the New Jersey Supreme Court rhetorically posed the question in an analogous racial quota case, decided under the anti-discrimination clause of the New Jersey Constitution, *Lige* v. *Town of Montclair, supra,* 367 A.2d at 844 (1976):

> We are a state of minorities. Is the composition of the Montclair Police Department to be measured aginst the population ratio of each minority group and, if imbalance be found, *which assuredly will be the case for many groups,* should a quota be used to "correct" the balance? [emphasis added]

Like the California Supreme Court, the New Jersey Supreme Court answered that question in the negative, concluding

> A quota creates castes and divides society. It is particular abhorrent when we are striving for an equality in society in which race is totally irrelevant. [367 A.2d at 844].

Thus, the *permissible* concern of the state in this area is to provide an equal opportunity for disadvantaged minorities to gain admission to the medical school on their individual merits. Coupled with that objective is the need to instill a recognition of this equal opportunity in minority aspirants, so that they will be encouraged to enter the competition. But this legitimate concern of the State is not the same as formulating a preconceived notion of the *results* of the competition and then changing the rules to foreordain such results. Stripped of rhetoric, the "compelling interest" advanced by the University here is nothing more than a "theory as to how society ought to be organized"[23] Close examination of that theory reveals a purpose to organize society along racial lines, at least for the foreseeable future. Such a purpose is not even legitimate or constitutional, let alone "compelling".

B. The Compelling State Interest in Improving Health Care Services for Needy Minority Communities Cannot be Equated with a Particular Need for More Minority Doctors.

These amici do not dispute the contention that there is a compelling state interest in improving the delivery of health care services to needy minority communities. But it is simply wrong to assume that the necessary solution to that problem is to artificially "pack" the next generation of the medical profession with minority doctors who may or may not be the best-equipped —and who may or may not be inclined—to fill the need for providing the best possible health-care services to minorities.

The record in this case does not even begin to prove the University's hypothesis that increased minority enrollment in the medical school is a necessary, or even an effective, response to the need for improved health care for minority communities.

A critical element of this hypothesis is the expectation that minority graduates of Davis will naturally gravitate back to their minority communities in sufficient numbers to alleviate in a substantial way existing health-care deficiencies. While it seems quite probable that such new minority physicians will tend to serve more patients of their own race or ethnic background, it is speculative to assume that those minority patients

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[23] De Funis v. Odegaard, *supra,* 416 U.S. at 342 (Douglas, J., dissenting).

will necessarily be the *poor* minority patients who represent the real problem in this area. As the California Supreme Court pointed out:

> [T]here is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive. [Opin. at 35] [24]

Thus, there is sound reason to believe that minority physicians, like white physicians, will tend to gravitate towards the most lucrative practices available to them. Recognition of this economic reality—certainly no more or less reliable than the University's assumption that minority physicians will gravitate towards needy minority communities—casts grave doubts upon the University's theory that simply more minority physicians is a meaningful response to the problem of inadequate health care for poor minorities.

However, even if it could be assumed that the increased number of minority doctors generated by the Davis program would in fact gravitate towards *poor* minority communities, a further flaw remains in the University's analysis. There is simply no real basis for

[24] While one study indicates that graduates of two predominantly black medical colleges—Howard University and Meharry Medical College—showed a greater tendency than graduates of other medical schools to accept positions in government hospitals serving the poor and to locate in central city communities with large minority concentration (Kaleda & Craig, "Minority Physician Practice Patterns and Access to Health Care Services," 2 Looking Ahead 1, 4-5 (Nov./Dec. 1976)), that study hardly establishes that minority physicians in general will tend to serve needy communities in substantially greater numbers than non-minority physicians. Minority doctors who graduate from predominantly white medical schools such as Davis may manifest practice patterns which differ sharply from those of graduates of predominantly black schools.

concluding that such a development is a necessary, or even an effective, means of dealing with the problem of inadequate health care for poor minorities.

Rather, one would think that a more direct and immediate solution would be for the State to provide incentives to good doctors, of whatever race, which would encourage them to serve minority communities. Human nature being what it is, direct or indirect financial incentives might be very effective in this regard. Direct state financial subsidies for medical offices serving designated minority communities might be one incentive, indirect tax credits or exemptions might be another. At any rate, the record does not suggest a genuine attempt to pursue such alternatives, let alone their exhaustion.[25]

In sum, the University's contention that increasing the number of minority doctors through discriminatory medical school admission quotas is a *necessary* response to the need for improved health care services for minorities is simply insupportable in fact. Certainly the University did not carry the burden of proof on the issue, as it must. *Dunn* v. *Blumstein, supra,* 405 U.S. at 342-43; *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967). Indeed, the University could never prevail on this issue, for its position is based on the wholly speculative notion that the complex problem of inadequate health care for minorities is best addressed by simply generating more minority doctors. The fallacy of this notion stems from the very kind of stereotypical think-

[25] It is also relevant to consider that the establishment of comprehensive government health care insurance in the near future could obviate much of the State's concern in this area.

ing which petitioners would be the first to condemn if applied in any other racial context.

III

THE STATE PLAINLY FAILED TO SHOW THAT QUOTAS ARE THE LEAST INTRUSIVE MEANS OF ACHIEVING ITS LEGITIMATE GOALS

Under the equal protection standard of "strict scrutiny" applied by the court below, it is not enough for the State to show that the racial classification involved actually furthers a compelling state interest. The State must also show that the means chosen is *necessary* to achieve the compelling objective in question, *Dunn* v. *Blumstein, supra,* 405 U.S. at 342, and that alternative means which would be less intrusive on constitutional rights are unavailable, *Shapiro* v. *Thompson,* 394 U.S. 618, 637 (1969). Thus, the mere contention that alternative means or methods of achieving the critical objective would be more costly or burdensome in implementation will not pass muster where the alternatives would dissipate the discriminatory effect of the classification. Here, the University fell far short of making the showing required under the "strict scrutiny" test.

As the amici have demonstrated in Point II, *supra,* the only legitimate interests of the State which might be deemed compelling insofar as the admissions program's effect on various races is concerned are (1) that the program provide an equal opportunity for admission on the basis of individual merit and capacity; and (2) that the program be perceived in that light by all aspirants for admission.

Recognizing these as the relevant and legitimate concerns, it becomes apparent that Davis's racially preferential admissions program ultimately undermines those objectives. Certainly it is not the method with the least capacity for invidious discrimination against individual applicants. As demonstrated in Point I.B., *supra,* the Davis program (1) rejects more qualified applicants in favor of less qualified applicants for racial considerations alone; (2) unfairly denies some disadvantaged white applicants of even-handed considerations for their educational and cultural handicaps by the arbitrary enforcement of a 2.5 OGPA cut-off in the general admissions program only; and (3) awards preferential treatment to minority applicants who might not be actual victims of past discrimination in education. No amount of rationalization or statistical manipulation can convert such disparate treatment into a "necessary" means of achieving equal opportunity. It is, rather, the antithesis of equal opportunity.

Nor is it credible to contend that such gross disparity of treatment is necessary to overcome the purported skepticism of minority aspirants towards the fairness of the system.

In the first place, as petitioners' own brief demonstrates, unprecedented numbers of minority college graduates are applying for admission to professional schools today, far more than could possibly be admitted. Petitioners would contend, no doubt, that the existence of special admissions programs such as that used at Davis are solely responsible for the healthy increase in minority applications to the professional schools. Petitioners would also contend—indeed, the structure of their argument requires them to do so—that abolition of quotas such as that used in the Davis program would inevitably result in a sharp decrease

in minority applications to the professional schools.

In this regard, petitioners not only indulge in possibly unwarranted self-congratulation, but also commit the logical fallacy of *post hoc, ergo propter hoc*—*i.e.*, that the increase in minority applications which followed implementation of racial quota systems was necessarily *because* of the implementation of racial quota systems.

These amici respectfully submit that the record in this case cannot be used to support the proposition that the abolition of racial quotas in admissions will discourage the serious and sincere minority aspirant from pursuing an application to medical school or to other professional or career channels. Petitioners' argument rests upon the unwarranted, and rather demeaning, presumption that most minority applicants have come to expect favored treatment in pursuing their career goals, and that withdrawal of preferential treatment will cause them to throw up their hands and withdraw from the fray. Rather, it is submitted that minority aspirants, like non-minority aspirants, sincerely desire nothing more than a fair and equal opportunity to have their applications judged on their true individual merits. Providing that opportunity, rather than dictating preferred results, is the true State interest involved here.

Nonetheless, even assuming there could be a compelling interest in achieving certain "acceptable" numbers in minority enrollment, it is plain that the means selected to achieve that end here—a stark racial quota—unnecessarily burdens the constitutional rights of others and therefore runs afoul of the Fourteenth Amendment. *Dunn* v. *Blumstein, supra,* 405 U.S. at 342-43; *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

Initially, it is important to be mindful that the burden is on the State to show that there are no reasonable alternative methods which would impose a lesser limitation on the rights of the group injured by the classification. *Dunn* v. *Blumstein, supra,* 405 U.S. at 342-43; *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967); *McLaughlin* v. *Florida, supra,* 379 U.S. at 192-93. The bare conclusory testimony of a University official that the Special Admissions Program is "the only method" (Petits. Brief p. 3) of increasing minority enrollment clearly does not satisfy the heavy burden of the State in this regard.

Indeed, petitioners recognize as much in their brief by relying on voluminous statistics and conclusory observations from various sociological tracts and other sources, none of the findings of which were exposed to cross-examination or scrutiny by the trial court. Thus, petitioners would have this Court assume that all forms of aggressive recruiting and remedial education programs have been tried and proven to be ineffective based upon a "brief description" of those programs in a recent study (Petits' brief pp. 36 and 37 n. 44). This after-the-fact making of a record to meet the State's burden of proof hardly presents an adequate factual underpinning for a critical assumption underlying a decision of major constitutional proportions.

Nor can the University validly dismiss other less discriminatory alternatives by a general plea of "dwindling financial resources" (Petits. Brief at 36). Such claims have been flatly and repeatedly rejected as a justification for rejecting a "less intrusive" alternative to a discriminatory classification in the equal protection decisions of this Court, *e.g., Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969).

In this case, all that the State has shown is that the Davis quota system is an *expedient* means of increasing minority enrollment. It certainly has not shown a thorough and systematic exploration of less discriminatory alternatives. Indeed, the University superimposed its present racial quota system on its admissions program *only one year after the school had been in operation*. Such haste to resort to a quota system is incompatible with the University's conclusory assertion that there are simply no alternatives to the means selected. It is apparent that the University never really pursued racially neutral alternatives but simply adopted the quota as a first and final resort.

Thus, the University cavalierly dismisses the alternative of a racially-neutral disadvantaged admissions program as follows (Petits' brief pp. 38-39):

> [A]doption of a truly racially "neutral" disadvantaged approach would do little more than substitute less-affluent whites for more affluent whites.
> . . . .
>
> It is almost certainly impossible to admit more than an isolated few minorities by resort to any referent truly neutral as to race.

Without commenting on the demeaning implications of such conclusory generalizations, it is sufficient to say that *the University does not really know whether they are true or not because it has not even tried them.* Specifically, the trial court found that the University's so-called "Special Admissions Program" was *never* operated as a means to increase enrollment of all *disadvantaged* students, regardless of race, but was used from its inception as a means of allocating a portion of the available seats in the medical school in a manner

which excluded any and all non-minority applicants from consideration for such seats solely on the basis of race. Thus, the record clearly shows that the University never even attempted to operate its "special admissions program"—purportedly open to aid *all* disadvantaged students—in a racially neutral fashion.[26]

In sum, the University has wholly failed to make a credible showing that resort to racial quotas is a necessary means of achieving its objective of increased minority enrollment at Davis. A wide variety of racially-neutral methods of achieving this end have never been genuinely pursued, let alone found wanting. Accordingly, the University has failed to justify the racial classifications incorporated in the Davis admissions program under the standard of strict judicial scrutiny applied by the court below.

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[26] The University also contends that a truly racially neutral special admissions program would not produce a meaningful increase in minority enrollment unless it were so large as to absorb a disproportionate share of the medical school's resources (Petits' brief at 39-40). To go that far merely to achieve a racially neutral admissions program, adds the University, would require it to "abandon educational values" to an unacceptable extent. Yet the University unhesitatingly compromised the principle of admission based on individual merit—an educational value heretofore deemed of great importance—in order to ensure an "acceptable" level of minority representation in its student body.

CONCLUSION

This case presents the Court with an opportunity to lay to rest once and for all the notion that the Equal Protection Clause is somehow selective in shielding citizens against the harmful effects of racial discrimination at the hands of the State. The California Supreme Court was correct in holding that the University's deliberate application of racially discriminatory criteria in its medical school admissions program violated Respondent's right to equal protection under the laws, and its judgment in this case should be affirmed.

ROGER A. CLARK
JOHN H. C. BARRON, JR.
GEORGE C. SMITH
ROGERS & WELLS
1666 K Street, N.W.
Washington, D.C. 20006
(202) 331-7760

Attorneys for Amici

Of Counsel:

GARY M. LIGHTMAN
Payne Shoemaker Building
Harrisburg, Pennsylvania 17108

JOHN C. RUCKELSHAUS
120 East Market Street
Indianapolis, Indiana 46204

JEROME K. TANKEL
1019 19th Street, N.W.
Washington, D.C. 20036

GLEN R. MURPHY
11 Firstfield Road
Gaithersburg, Maryland 20760

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